JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 1

Professional Responsibility:

Rule 1.7 of the Rules of Professional Conduct expressly precludes the representation of two clients where the representation involves the assertion of a claim by one client against the other in the same litigation. If the negligence suit is not barred, as discussed below, Judy may have to sue Joe and Mr. Burr. Accordingly, the same attorney should not represent both individuals.

Possible claims by Joe:

Joe should bring a negligence action against Mr. Burr. A plaintiff must prove the following in order to have a valid action for negligence:

1. that the defendant owed a duty to protect the plaintiff from injury;
2. that the defendant breached the duty;
3. that the plaintiff suffered actual injury/loss; and
4. the defendant's breach of the applicable duty was the proximate cause of the injury/loss.

The facts indicate that Mr. Burr deliberately erected a dangerous fence in the area that he knew trespassers often gathered to snowmobile, and that Joe was injured as a result thereof. Generally a landowner owes no duty to trespassers, except that the landowner may not willfully or wantonly injure or entrap the trespasser. Since Burr deliberately erected a dangerous fence in the area where he knew trespassers would gather, Joe may be successful in this suit. An issue arises as to whether Joe's presumed knowledge and violation of the law could be considered contributory negligence. If so, his claim may be barred.

Violation of a statute: When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligent to deviate. But where the statute merely declares that conduct is a crime, and makes no mention of any civil remedy, the court is under no compulsion to apply the statute and it becomes more difficult to find negligence as a result of said violation, particularly when no penalty is attached to the violation. Accordingly, negligence will not be imputed.

Possible claims by Judy:

Judy possesses the same argument against Mr. Burr that Joe does. It should also be argued, in the alternative, that Judy was not a trespasser since an unintentional and involuntary

entry onto someone's property is not a trespass. Generally, a Plaintiff will not be barred from recovery by the negligence of a third person unless the relation between the two is such that the Plaintiff would be vicariously liable as Defendant to another who might be injured. Therefore, the driver's negligence is generally not imputed to the passenger, unless the passenger would be vicariously liable as a Defendant. Thus, Judy may be able to sue Mr. Burr for his negligence.

Judy may also bring a negligence action against Joe. Joe knew, or should have known, of the law against snowmobiling, yet he decided to take her on Burr's property. She was injured as a direct result of his activity. However, Joe may raise the affirmative defense of assumption of the risk. Judy chose to ride in a snowmobile built for one rider and, therefore, assumed the risk of her resulting injuries.

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 2

Custody

Courts have consistently held that parents have the constitutional right under the Fourteenth Amendment to raise their children. However, under exceptional circumstances, a court may remove the child from the custody of the biological parent(s) and grant custody to a private third party. Grandparents seeking custody are considered acceptable such third parties.

The test to be applied in determining whether there are exceptional circumstances to justify removing the children from their biological parent(s) takes into account:

(1) the length of time that the child has been away from the biological parent;
(2) the age of the child when care was assumed by the third party;
(3) the possible emotional effect on the child of a change of custody;
(4) the period of time which elapsed before the parent sought to reclaim the child;
(5) the nature and strength of the ties between the child and the third party custodian;
(6) the intensity and genuineness of the parent's desire to have the child; and
(7) the stability and certainty of the child's future in the custody of the parent.

The behavior of the parents in establishing and interfering with established relationships (bond formed, nature of the relationship, consideration of the parents for established relationships, and related issues), and the effect said behavior has on the children, is certainly something which is considered by reviewing courts.

The children have lived with their grandmother since 2000. The father never visited and only sporadically offered monetary support. He removed them to Florida with no thought of their bond with their grandmother or their grief over their mother. A court may find exceptional circumstances to grant custody to the grandmother under these circumstances.

Visitation

A similar test is used to address the issue of visitation. Maryland law grants visitation rights to grandparents "if the court finds it to be in the best interests of the child." Despite this broad language, there is still the presumption of parental correctness in determining whether the children should have visitation with the grandparents, as visitation is a type of custody of a limited duration. Thus, a grandparent seeking visitation against the wishes of the biological parent must show that the parent is unfit or that there are, again, exceptional circumstances.

Jurisdiction

The grandmother will have to establish that Maryland has jurisdiction in the matter since the children were relocated to Florida. Maryland law establishes that Maryland courts have jurisdiction if:

1) Maryland is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
2) no other state court has jurisdiction (or has declined jurisdiction on the basis that Maryland is more appropriate);
3) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with Maryland other than mere physical presence; and
4) substantial evidence is available in Maryland concerning the child's care, protection, training/development, and personal relationships.

The grandmother will need to file suit immediately to show that Maryland was the home state within six months prior to the commencement of the proceeding.

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 3

A conspiracy exists when two or more persons enter into an agreement to accomplish a criminal or unlawful purpose. The gist of the offense is entering into the illegal scheme, not in the doing of the act, the effecting of the purpose for which the conspiracy is formed, or an attempt to do the act or effect the purpose. The crime of conspiracy is complete at the moment the unlawful agreement is made, without doing any overt act. *Greenwald v. State*, 221 Md. 235, 155 A.2d 894 (1959); *Regle v. State,* 9 Md. App. 346, 264 A.2d 119 (1970). Abel was guilty of conspiracy at the moment that Abel and Baker "agreed" to the breaking and theft.

A co-conspirator is liable for all acts committed in furtherance of the conspiracy. However, a conspirator may withdraw from the conspiracy. A conspirator is not liable for any act committed after withdrawal (although a conspirator who joins after the formation of the conspiracy is liable for prior acts done in furtherance). Withdrawal involves intention, and is a matter of fact. Whether Abel's hesitation and failure to arrive on time manifested an intent to withdraw, particularly in light of his subsequent tardy arrival, is a matter for the trier of fact.

If Abel is found to have withdrawn from the conspiracy when he failed to arrive, Abel is relieved from criminal liability for the subsequent acts of Baker, including the shooting of the guard. Otherwise, Abel may be guilty of the first degree assault since it occurred in furtherance of the conspiracy in which he was a member, despite his express exclusion of guns from the purpose of the conspiracy.

Arguably, Baker terminated from the conspiracy with Abel when (a) Abel failed to appear and Baker entered into a new conspiracy with Charlie; and/or (b) Baker carried a gun (in contravention of Abel's express condition upon participation). If so, there may have been a momentary period of time when no agreement between two individuals existed and the initial conspiracy terminated. If so, Abel is relieved from criminal liability for the subsequent acts of Baker (and Charlie), including the shooting of the guard.

It is not necessary for the conviction of one co-conspirator that another co-conspirator be prosecuted or convicted. It is only where one is convicted and another is acquitted that a prosecution for conspiracy is barred or a conviction for conspiracy may be vacated. *Hurwitz v. State,* 200 Md. 578, 92 A.2d 575 (1952).

Without the necessity of a request, the State's Attorney shall provide to the defense all information that tends to exculpate the defendant and the failure of a witness to identify the defendant or a co-defendant. *Brady v. Maryland,* 373 U.S. 83 (1963); *Rule* 4-263 (d). The State's Attorney shall exercise due diligence to identify all of the material and information that must be disclosed. The obligations of the State's Attorney extend to material and information in the possession and control of any person who reports regularly, or has reported, to the State's Attorney's

office in regard to the particular case. *Rule* 4-263 (c). If at any time during the proceedings the court finds that the State has failed to comply with the disclosure requirement in the case, the court may order that discovery of the undisclosed matter be permitted, grant a reasonable continuance, grant a mistrial, or enter any other order under the circumstances. *Rule 4*-263 (n).

In this case, the failure of the security guard to identify Baker is clearly exculpatory of Abel on the charge of assault and battery. Since Baker has not been charged, there is a question as to whether he is a "co-defendant" whose non-identification must be disclosed within the meaning of the Rule 4-263. The obligation of the State's Attorney extends to any information known to a police officer involved in the investigation of a crime. *State v. Williams*, 398 Md. 194 (2006).

In determining a sanction the court will consider whether a report of the attempted identification was prepared or submitted (or concealed) by the officer, the extent of the due diligence exercised by the State's Attorney, whether and how the prejudice to the defendant can be cured, and any other relevant factor.

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 4

PART A

(a) Alvin's lawyer would file Motions to Dismiss under Maryland Rules 2-322(a) and (b). Motions under Rule 2-322(a) are mandatory, and must be filed before the answer is filed. The mandatory motion would be based on 2-322 (a)(4) – insufficiency of service of process. The facts state that Alvin was served by first class mail; Rule 2-121(a) requires that service by "delivering to the person to be served … or by mailing to the person to be served … by certified mail requesting: "Restricted Delivery – show to whom, date, address of delivery" copies of the summons, complaint, and other papers filed. Delivery to Alvin by first class mail was insufficient under the Rule. Furthermore, Alvin can argue under Rule 2-322(a)(2) that venue is improper. The Complaint was filed in the Circuit Court for Baltimore County. Alvin is a resident of Anne Arundel County; the accident occurred in Kent County. Md. Cts. & Jud. Proc. Code Ann. § 6-201(a) provides that generally, "a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation." The facts do not indicate that Alvin has any contacts with any County other than Anne Arundel County. The suit should have been filed in Anne Arundel County. Section 6-202(8) of the Md. Cts. & Jud. Proc. Code Ann. also permits the filing of a tort action in the County where the cause of action arose; the accident occurred in Kent County, so the action could also have been filed there. Alvin should prevail on both motions. Venue should be transferred to either Kent County or Anne Arundel County, and Sheila should have to effect service properly under the Rules.

There is also basis for a motion under Rule 2-322(b)(2) -- failure to state a claim under which relief can be granted. In this case, it appears that Jud's claim was untimely filed. The accident occurred in March 2005; the action was filed in June 2009, more than three years later. Md. Cts. & Jud. Proc. Code Ann. § 5-101 provides that "[a] civil action at law shall be filed within three years from the date it accrues…" If the limitations defense is apparent on the face of the Complaint, it may be raised by a Motion to Dismiss for failure to state a claim under which relief can be granted. The claim filed on Keith's behalf does not appear to be barred by limitations. Keith was 14 when the cause of action accrued (the date of the accident). He remained under a disability until he attained majority when he turned 18 in March, 2008. Section 5-201(a) of the Md. Cts. & Jud. Proc. Code Ann. provides that the statute of limitations is extended for minors while they are under a disability. The statute is extended for minors for "the lesser of three years or the applicable period of limitations after the date the disability is removed." In this case, the limitations period for Keith's cause of action would run until March 15, 2011, which is three years following the time that Keith's disability was removed by his attaining the age of majority.

(b) The Court should grant the motions. The venue is improper for the reasons set out

in the answer to part (a), above, and service was not proper under the methods set out in Rule 2-l2l(a). Service is easily cured by either effecting service as provided in the Rules, or by asking Alvin's counsel to accept service on his behalf. Venue can be cured by transferring the action to the proper venue, probably the County where Alvin lives, unless Alvin is willing to waive that, too. Both of these motions were mandatory and to be raised initially or waived. However, both motions may well be moot in Jud's case, since it appears on the face of the complaint that the statute of limitations has run on Jud's cause of action, and the Motion to Dismiss under Rule 2-322(b)(2) should be granted.

PART B

The trial court should overrule Sheila's objection and permit Alvin's testimony. Rule 2-432(a) permits a discovering party to obtain sanctions if a party fails to appear at his deposition after proper notice. The motion for sanctions "shall be filed with reasonable promptness." Rule 2-432(d). Since Sheila neglected to use the remedies provided by Rule 2-432(a), the trial court should not impose sanctions during the trial.

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 5

Execution of a mortgage by Chaney in December 1985, as to his undivided interest in Parcel B destroyed the joint tenancy and made Chaney and Bush tenants in common, each with an undivided one-half interest in Parcel B. Each could convey or devise his one-half interest. Alexander v. Boyer, 254 Md. 511.

On Bush's death in 2006, his one-half interest in Parcel B did not vest in Chaney because of the destruction of the joint tenancy, but would go through Bush's intestate estate to his daughters, who would each have a 25% undivided interest in Parcel B.

Chaney and Bush had an easement by implied reservation by necessity over Parcel B. Where there is a conveyance of land without an express reservation of an easement, an easement may be implied if it is reasonably necessary for the fair enjoyment of the property retained by the grantor. An easement cannot be taken or reserved by implication unless it is de facto annexed and in use at the time of the grant, and it is shown to be necessary to the enjoyment of the parcel retained by the grantor. George and Laura retained such an easement over the 200 foot driveway when they conveyed Parcel B to Bush and Chaney on September 1, 1985.

Easement of necessity continues to exist only as long as there may be a necessity for its use, and it ceases to exist when the necessity for it ceases. Here, when the new public road was built, the need for an easement over Parcel B ceased and the easement would be extinguished. Here, there is unlikely to be an easement by prescription; even through the driveway has been in existence and used by George and Laura for twenty years, it has likely been used with permission of their sons and not hostile. Although the easement has been extinguished, Chaney and Bush's daughters may have a right to use the driveway as tenants in common in Parcel B.

The doctrine of merger is also involved in this factual pattern since Chaney acquired title to A and an undivided interest in B. Merger did not occur because of the outstanding interest of Bush and his heirs. Kelly v. Nagle, 150 Md. 125.

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 6

The facts of this question provide an opportunity for an applicant to discuss whether either a letter of intent or a proposed contract created an enforceable contract under Maryland law.

Based on the facts presented, the Buyers would assert that the letter of intent was enforceable because there was an offer and acceptance that was supported by consideration and the letter of intent was in writing and was signed by Dave and the Buyers. However, Dave would assert that, if reviewed objectively, the letter of intent was not an enforceable contract, since he did not intend to be bound because he reasonably expected to receive a standard form of contract from the Buyers for his review and approval. Therefore, his position would be that there was no mutual assent by both parties.

In advising Dave, the attorney should conclude that under the principle of the objective interpretation of contracts adhered to in Maryland, the Buyers will not prevail since it is incumbent upon a Maryland court to give effect to the plain meaning of a contract and not to contemplate what the parties may have subjectively intended by certain terms at the time of formation. See, *Cochran v. Norkunas*, 919 A.2d 700, 398 Md. 1 (2007).

The letter of intent references that a standard form contract will be sent to Dave within 72 hours. Although all parties signed the letter of intent and it was supported by consideration, the letter of intent was not intended by the parties to contain all of the essential terms of their agreement. The attorney should advise Dave that the letter of intent was not an enforceable agreement.

An applicant might also address the issue of whether the contract for sale signed by Dave (but not delivered to the Buyers) would constitute an enforceable contract. Since Dave did not mail the executed standard form contract to the Buyers, the contract is not enforceable. Even if Dave had mailed the contract, at best, it would be construed as a counter-offer because the terms were modified by Dave prior to his signing the contract. Consequently, Dave did not accept the contract submitted by the Buyers. See, the discussion of the postal acceptance rule by the Court of Appeals in *Reserve Insurance v. Duckett*, 249 Md. 108, 238 A. 2nd 536 (1968).

Neither the letter of intent nor the standard form contract satisfies the criteria for an enforceable contract. Therefore, the Buyers will fail in their pursuit of specific performance.

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 7

a. A limited liability company ("LLC") would be the business entity that best achieves the clients' goals. The reasons for this recommendation are as follows:

1) Sam, Mark and Willy can invest equal amounts in the business and receive an interest in the LLC without the responsibility of making any further capital contributions. No member of an LLC is personally liable for the obligations of the LLC solely by reason of being a member. (Corporations and Associations Article, §4A-301)

2) An LLC is formed upon the acceptance for record of the Articles of Organization by the Maryland State Department of Assessments and Taxations. An operating agreement is permitted but not required. There are no other formalities required except those necessary for tax and other governmental reports reflecting operation of the LLC. (§4A-202)

3) Unless the operating agreement provides to the contrary, a member may lend money to the LLC and subject to other applicable law, that member has the same rights and obligations with respect to the loan as any other lender who is not a member. (§4A-405)

4) Profits and losses of an LLC are allocated among the members in proportion to their respective capital interests unless otherwise provided in an operating agreement. (§4A-503)

5) An LLC has the power to allocate duties to or employ a member or other person as a manager for the operation of the business of the LLC. The terms and conditions of a manager's duties should be contained in either the operating agreement or in a separate employment agreement. (§4A-402)

6) The operating agreement for the LLC may specify the requirements for the approval of the actions of an LLC. Unanimous consent, if required by the operating agreement or other law, must be in writing. (§4A-404)

b. To implement the recommendation, the following documents should be prepared:

1) Articles of Organization are necessary to create the LLC under the laws of Maryland.

2.) Operating Agreement that sets forth the interests of each member, the voting requirements and the management duties of Mark. Mark's employment duties and salary can also be set forth in an employment agreement.

3) Sam's loan of $10,000 should be evidenced by a promissory note signed by the LLC upon unanimous consent of the loan by all the members. The loan can be secured by the inventory and equipment through an executed security agreement between Sam and the LLC and a properly filed financing statement.

4) Unanimous written consent document for the loan made by Sam to the LLC.

c. Since Sam, Mark and Willy have interests which are adverse with respect to the loan and the designation of Mark as the manager of the business, they must be advised that you will only represent the entity to be formed and that each requires independent advice of counsel with respect to the loan and to the management duties of and compensation for Mark serving as the manager of the business. The waiver of and informed consent to these conflicts must be confirmed in writing. The fee arrangements and the details regarding the scope of the attorney's representation should be communicated to the client, preferably in writing. *See* Maryland Lawyers' Rules of Professional Conduct, Rules 1.2, 1.5(b) and 1.7.

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 8

(1) MRPC 1.4(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Lawyer did not disclose that the deed of trust was materially defective and did not serve its purpose of securing the loan. Lawyer did not explain that he intended to fund his repayment of the loan from the 5% commission as he made no monthly payments on the deed of trust. Lawyer did not explain why he should receive payment for all his services on the hourly rate agreement and, in addition, a 5% commission on the sale price.

(2) MRPC 1.5(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: * * * (3) the fee customarily charged in the locality for similar legal services; * * * (8) whether the fee is fixed or contingent. * * *

Lawyer's receipt of payment at his hourly rate for all services he rendered to Elder and of the 5% commission of the sale price was not reasonable under the given facts. There was no explanation of Lawyer's entitlement to the 5% commission.

(3) MRPC 1.5(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

The given facts do not state whether or not Elder had been a regularly represented client of Lawyer. There was no written agreement regarding the 5% commission. There was no explanation by Lawyer of his fee for his hourly rate and a 5% commission.

(4) MRPC 1.5(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement * * * .

The amount of Lawyer's fee was contingent, in part, on the sale price. There was no written agreement for that fee.

(5) MRPC 1.7(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if: * * * (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Lawyer had a conflict of interest as a result of his solicitation and receipt of the personal loan from Elder.

(6) MRPC 1.8(a) A lawyer shall not enter into a business transaction with a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The loan was a business transaction with Elder. (1) On the given facts, there was no written disclosure to Elder on how Lawyer intended to handle the transaction. The deed of trust as written and provided by Lawyer was a sham. (2) Lawyer never advised Elder to seek the advice of independent legal counsel prior to or at anything regarding the personal loan to Lawyer. (3) An informed consent written statement was never obtained from Elder.

(7) MRPC 8.4 (c) It is professional misconduct for a lawyer to: * * * (c) engage in conduct Involving dishonesty, fraud, deceit or misrepresentation

(8) MRPC 8.4 (d) It is professional misconduct for a lawyer to: * * * (d) engage in conduct that is prejudicial to the administration of justice

Lawyer's receipt of payment for his professional services rendered at his hourly rate and a 5% commission as well; his omissions in drafting and providing the deed of trust to secure the loan particularly when he was experienced in real estate transactions, and his method of handling the re-payment of the loan without regard to the deed of trust terms he had provided to Elder, constitute violations of this section.

Reference:
Attorney Grievance Commission v. Parker
389 Md. 142, 884 A.2d 104 (2005)

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 9

The issues presented here are what rights Walker S&L has to recover as a secured party to the Dollar Note pledged by Diana Troy.

Title 9 of the Commercial Law Article sets forth a secured party's right to dispose of collateral after a default. Although Walker S&L does not have possession of the note by filing the finance statement, it has a valid perfected security interest in the note under 9-312.

Walker S&L may take possession of the note pursuant to the lawful measures set forth in Section 9-609. Walker S&L has the right to take possession of the collateral since Diana Troy defaulted. Section 9-609.

Walker S&L has the right to dispose of the Dollar Note in a commercially reasonable manner. 9-610. Diana Troy owed $150,000 to Walker S&L on the loan she received from Walker S&L. If Walker S&L receives more than that amount upon selling or collecting on the Dollar note, after it has accounted for all of its fees and expenses, it must pay off other secured creditors on the note, if any, and return the remainder to Diana Troy. 9-608. It is unlikely that Walker S&L will get the entire $200,000 owed on the note. However, if there a deficiency, Troy would be liable for that amount. Walker S&L also has the right to institute a suit against Mr. Dollar on his personal guarantee to recover all or part of the amounts owed it on its loan to Diana Troy.

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 10

a. MRE 5-613(b) requires that at some point before counsel completes his or her examination of the witness that the witness is shown a written statement and given an opportunity to explain or deny having made it. Here, the prosecutor must give Christine an opportunity to both see and either admit, deny or explain the prior written statement. Unless the prosecution does this, he or she cannot offer the document as extrinsic evidence. The list must also first be authenticated by Christine or someone else with knowledge of her handwriting before it is introduced.

b. The Defendant may object on the grounds that the tax return contains inadmissible hearsay statements used to prove the truth of the matter asserted (i.e. that she earned $2,000,000 from the CARES operation). The records may, however, come in as an admission under MRE 5-803(a), business record under MRE 5-803(b)(6), or public record under MRE 5-803(b)(8) exceptions to hearsay. The document will still have to be authenticated unless certified.

c. and d. The recording is an illegal wire tap of Christina's statements because it is without her consent. Thus, the communication is inadmissible through the tape. CJP 10-§101, 10-§102 and 10-§105. However, because the statements were made directly to Johnny, and thus personally perceived by him, he can testify as to those statements as an admission by Christina.

e. The testimony of Dr. Bill will be inadmissible hearsay because Governor is not a party opponent in the criminal action against Christiana. The testimony also may violate the patient-psychologist privilege. Pursuant to CJP § 9-109 a patient who communicates with or receives services from a psychiatric-mental health professional enjoys a privileged communication regarding the diagnosis or treatment of the patient's mental condition. The privilege can only be waived by the patient--Governor (whether or not he/she is a party), unless for example the patient puts the communication itself in issue.

f. Pursuant to MRE 5-802 the testimony of Spitfire's wife will be inadmissible hearsay because Governor is not a party opponent in the criminal action against Christiana. Moreover, pursuant to CJP § 9-105 one spouse is not competent to disclose any confidential communication between the spouses which occurred during marriage. Therefore, it does not matter that Spitfire is not a party to the criminal action, because his wife is not competent as a witness, unless they both agree to her testimony.

g. As with the Spitfire's wife, the testimony of Christiana's ex-husband will be inadmissible as a confidential communication of one spouse to the other while the two were married. Waiver of the privilege is held by both spouses, and the privilege applies to couples that are no longer married, so long as the communication was made during the course of the marriage.

JULY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS